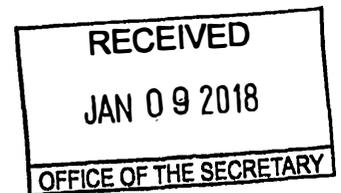


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



In The Matter of:

The Application of SECURITIES INDUSTRY
AND FINANCIAL MARKETS ASSOCIATION

For Review of Amendments of the
NASDAQ/Unlisted Trading Privileges Plan
Limiting Access to its Services.

Admin. Proc. File No. 3-18313

RESPONSE TO NASDAQ'S MOTION TO HOLD PROCEEDING IN ABEYANCE

The Securities Industry Financial Markets Association ("SIFMA") submits this response, under Rule 154 of the Rules of Practice, to Nasdaq's motion to hold this proceeding in abeyance.

This proceeding challenges the lawfulness of fees for core or top-of-book market data supplied exclusively by Nasdaq. SIFMA's application asks the Commission to set aside, under Section 11A of the Securities Exchange Act of 1934, Nasdaq's amendment stating that market-data fees may apply to derived data long exempted under the UTP National Market System Plan. As described more fully in SIFMA's separate comment letter submitted to the Commission on December 11, 2017, before this proceeding began, Nasdaq's amendment is substantively unlawful and procedurally defective. *See* File No. S7-24-89. It does not define derived data, quantify the fee in question, describe the fee's scope, or justify the fee's imposition as fair, reasonable, and not unfairly discriminatory as required by the Exchange Act and the Commission's regulations.

Neither Nasdaq nor the Commission has yet responded to these and additional concerns expressed by SIFMA and others regarding Nasdaq's derived-data amendment. *Id.* SIFMA continues to object to the amendment, and respectfully urges the Commission to preserve the

status quo by exercising its authority to amend this national market system plan, 17 C.F.R. § 242.608(a)(2), abrogate the amendment, *id.* § 608(b), stay the limitation on access, 15 U.S.C. § 78k-1(b)(5)(A), or take other just and appropriate action.

Nasdaq's December 27 motion asks the Commission to hold SIFMA's application for review in abeyance pending the Commission's resolution of *In re Application of SIFMA*, No. 3-15350. Nasdaq's motion states that the decision in *In re SIFMA* is "likely to inform the parties' arguments and the Commission's decision in this matter," Mot. 1, based on the Initial Decision's conclusion that "the exchanges are 'subject to significant competitive forces in setting fees' for market data, including 'the availability of alternatives' to the exchanges' products and the 'need to attract order flow from market participants,'" Mem. at 4 (quoting Initial Decision at 31).

In re SIFMA and the competition arguments Nasdaq cites are inapposite. *In re SIFMA* concerns depth-of-book data fees. This proceeding, by contrast, concerns core or top-of-book data, which is offered on an exclusive basis by exchanges acting jointly through CTA. Top-of-book data indisputably is not subject to competitive forces, product substitution, or competition to attract order flow. As the Commission and the courts have recognized many times, core data fees raise anticompetitive concerns that warrant more stringent review.¹ The issues Nasdaq cites from the depth-of-book *In re SIFMA* Initial Decision, therefore, do not concern "common substantive legal issues" with this UTP matter, Mem. at 2, and simply are not "relevant to whether the [UTP] market-data fees challenged by SIFMA in this proceeding are consistent with the Exchange Act," Mem. at 4.

¹ See, e.g., *NetCoalition v. SEC*, 615 F.3d 525, 536 (D.C. Cir. 2010) (citing Regulation of Market Information Fees and Revenues, Release No. 34-42208, 64 Fed. Reg. 70,613 (Dec. 17, 1999)); *NetCoalition v. SEC*, 715 F.3d 342, 345 (D.C. Cir. 2013); NYSE ArcaBook Order, 73 Fed. Reg. 74770, 74779 (Dec. 9, 2008); Regulation NMS, 70 Fed. Reg. 37,496, 37,558 (June 29, 2005).

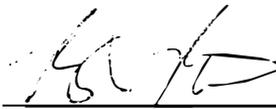
Nevertheless, SIFMA currently does not oppose Nasdaq's request to hold SIFMA's application in abeyance. At this time, Nasdaq has not provided SIFMA or other affected parties with sufficient information to evaluate the purpose or effect of the derived-data fee amendment, and Nasdaq has not identified any impending change in the UTP fees it charges.

Unless and until Nasdaq identifies a fee change based on this amendment, SIFMA does not oppose the Commission's holding this proceeding in abeyance, provided that any such action is without prejudice to SIFMA's future ability to pursue Commission review of its application.

Dated: January 8, 2018

Respectfully submitted,

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Rule of Practice 420(c) Statement: Service upon the applicant may be accomplished by serving their attorneys at the address listed above.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2018, I caused a copy of the foregoing Response to Nasdaq's Motion to Hold Proceedings in Abeyance to be served on the parties listed below by hand delivery.

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Dated: January 8, 2018



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